**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| XF ENTERPRISES, INC., | : | |
| | : | |
| Plaintiff, | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | NO. 99-3693 |
| BASF CORPORATION, et al., | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM AND ORDER**

BUCKWALTER, J. November 2, 1999

Presently before the Court is the Plaintiff's Motion to Remand this Action to the Court of Common Pleas, Philadelphia County. For the reasons stated below, the Motion is Granted.

**I. Background**

On June 15, 1999, Plaintiff XF Enterprises, Inc. ("XF") filed a putative class action entitled XF Enterprises, Inc. v. BASF Corporation et al. in the Philadelphia County Court of Common Pleas. The Defendants included BASF Corporation ("BASF"), Degussa-Huls Corporation ("Degussa-Huls"), Chinook Group, Inc. ("Chinook"), Roche Vitamins, Inc. ("Roche"), Hoffman-Roche, Inc. ("Hoffman-Roche"), Rhone-Poulenc Animal Nutrition, Inc. ("Rhone-Poulenc"), Lonza, Inc. ("Lonza") and Ducoa, L.P. ("Ducoa"). XF manufactures and sells vitamin fortification products for livestock and manufactures feedyard supplements for ranches and feedlots. The complaint ("Complaint") alleges that the Defendants, a group of business entities that are major players in the vitamin business, conspired to "fix prices" in

violation of Pennsylvania anti-trust law from January 1, 1988 to the present (the "Class Period"). XF asserts that it has been harmed by Defendants as both a direct and indirect purchaser of vitamins. The Complaint further asserts state law claims of fraud, negligent misrepresentation and violations of the Pennsylvania UTPCPL.

On July 21, 1999, Defendants removed the case pursuant to 28 U.S.C. § 1441 on the basis that this Court has subject matter jurisdiction under 28 U.S.C. § 1331. The Defendants believe the removal is proper because XF's anti-trust claim is really a federal claim pleaded so as to deprive the Defendants of the benefit of a federal forum.

**II. Legal Standard**

Plaintiffs' motion is properly before this Court pursuant to 28 U.S.C. § 1447(c), which provides, in relevant part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

In ruling on a motion for remand, "the district court must focus on the plaintiff's complaint at the time the petition for removal was filed . . . [and] must assume as true all factual allegations of the complaint." Steel Valley Auth. v. Union Switch and Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) (citation omitted), cert. dismissed sub nom. American Standard, Inc. v. Steel Valley Auth., 484 U.S. 1021 (1988). The burden is on the removing defendant to show the existence and continuance of federal jurisdiction. See Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir.), cert. denied, 516 U.S. 1009 (1995). "The removal statutes 'are to be strictly construed against removal and all doubts should be resolved in favor of remand.'" Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (quoting Steel Valley, 809 F.2d at 1010), cert. denied, 498 U.S. 1085 (1991). These principles have developed

"[b]ecause lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile." Brown v. Francis, 75 F.3d 860, 864 (3d Cir. 1996) (*quoting* Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985)). Removal under § 1441(a) "is proper only if the federal district court would have had original jurisdiction if the case was filed in federal court." Id.

This Court has original subject matter jurisdiction over civil actions arising under federal laws. See 28 U.S.C. § 1331. The Supreme Court has held that the presence or absence of federal question jurisdiction under §1331 is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. See, Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). Allied as an important corollary to the well-pleaded complaint rule is the principle that a plaintiff may not defeat removal by omitting to plead necessary federal questions. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 23 (1983). If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. Rivet v. Regions Bank of Louisiana, 118 S.Ct. 921, 925 (1998). The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. See, Metropolitan Life Ins. Co v. Taylor., 481 U.S. 58, 65-66, (upholding removal based on the preemptive effect of § 502(a)(1)(B) of the Employee Retirement Income Security Act); Avco Corp. v. Machinists, 390 U.S. 557, 560, (1968) (upholding removal based on the preemptive effect of § 301 of the Labor Management Relations Act). Although federal preemption is ordinarily a defense, "[o]nce an area of

state law has been completely preempted, any claim purportedly based on that preempted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, 482 U.S., at 393. The Supreme Court has also regarded removal as proper, despite the absence of a federal claim on the face of the complaint, in "substantial federal question" cases. See, Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).[1] However, the Supreme Court held in Rivet that an anticipated federal defense can not be used as a basis for removal, and that there is no 'claim preclusion' exception to this general rule. 118 S.Ct. at 925.

**III. Discussion**

The Defendants make essentially two claims to defeat remand. The first is that the artful pleading doctrine is not restricted to state law claims that have been completely preempted by federal law. The second claim by the Defendants is that the anti-trust allegations are essentially federal because Pennsylvania does not have an anti-trust statute. The Court examines these contentions in turn.

1. Does the Artful Pleading Doctrine apply only when the state law claims are completely preempted by federal law?

Both parties agree that the federal antitrust laws do not completely preempt existing state antitrust laws. See, California v. ARC America Corp., 490 U.S. 93 (1989). Nevertheless, Defendants argue that removal is still justified under the artful pleading doctrine even though the state claims are not completely preempted by federal law. See, Def. Mem in

1. Substantial federal question cases involve seemingly "pure" state law claims that turn on and implicate an important question of federal law. Defendants do not argue that removal is proper because XF's state law claims turn upon a construction of federal antitrust law.

Opp., p. 6. This claim is based on a footnote from the Supreme Court's decision in Federated Department Stores v. Moitie, 452 U.S. 394 (1981).[2] On the basis of this footnote, some lower courts found that removal was justified if the defendant asserted a claim preclusion defense. Both parties agree that using a claim preclusion defense as a means of removing a case is no longer valid after Rivet, 118 S.Ct. at 926 ("We therefore clarify that Moitie did not create a claim preclusion exception to the rule, fundamental under governing legislation, that a defendant cannot remove on the basis of a federal defense). However, the Defendants assert that removal can be proper absent "complete preemption" under Moitie, stating that "Rivet can not be cited as holding that the complete preemption is the *only* circumstance where the artful pleading exception applies". See, Def. Mem. in Opp., p. 8. In support of this proposition, the Defendants cite to Buchanan v. Delaware Valley News, 571 F.Supp. 868, 871-72 (E.D. Pa. 1983) (action filed in state court purporting to be based on "Pennsylvania antitrust law" could be removed under the artful pleading exception).

The Court tends to agree with Defendant that the Rivet Court's holding did not clearly limit the artful pleading doctrine to claims completely preempted by federal law. Rivet

2. The famous footnote reads in its entirety: The Court of Appeals also affirmed the District Court's conclusion that Brown II was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum ... [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure S 3722, pp. 564-566 (1976). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two Brown complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artfully]" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding. ,See, Prospect Dairy, Inc. v. Dellwood Dairy Co., 237 F.Supp. 176 (NDNY 1964); In re Wiring Device Antitrust Litigation, 498 F.Supp. 79 (EDNY 1980);

did eliminate the removal of cases based on a res judicata defense resulting from a prior federal judgment. The Supreme Court also reiterated its position that removal was not proper based on an anticipated federal law defense. 118 S.Ct. at 926. However, the controlling law of our Circuit is that the artful pleading doctrine extends no further than to completely preempted state claims. See, Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 310-311 (3d Cir. 1994) ("We have held that the only state claims that are really federal claims and thus removable to federal court Franchise Tax Bd., 463 U.S. at 13, are those that are completely preempted by federal law); Orthotic Sales and Services, Inc. v. LaRosa, 1998 U.S. Dist. LEXIS 12181 at *7 (E.D. Pa.).[3] Therefore, the Defendants concession that antitrust law is not completely preempted by federal law is fatal to their claim for removal.

The Defendants ask this Court to draw the same inferences as the Buchanan Court to find that Plaintiff has intended to deprive them of a federal forum by failing to state a federal claim in its Complaint. See, Def. Mem in Opp., p. 11. But the Supreme Court's jurisprudence states that the plaintiff is "master of his claim". As Defendant points out, XF could not have made its "indirect purchaser" claims under federal anti-trust law, so state court was the only place it could file its claim. See, Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977) (indirect purchasers have no right to pursue damage claims under the Clayton Act). Since the Supreme Court held that federal anti-trust law does not preempt state antitrust law, the plaintiff is free to bring its claims as a direct purchaser under state law only. See, ARC America, 490 U.S. at 101.

3. The Court does not read the holding in Goepel as eliminating removal based upon a "substantial federal question".

2. Is the antitrust claim removable because there is no antitrust statute or remedy under Pennsylvania law?

The Defendants also contest Plaintiff's state antitrust claims because Pennsylvania admittedly has no antitrust statute. See, Def. Mem. in Opp., p. 13-15. However, Pennsylvania courts have recognized the unlawfulness, in a civil context, of price fixing conspiracies and other combinations in restraint of trade. See, Main Line Bd. of Realtors, 304 A.2d 493 (Pa. 1973). While Plaintiff concedes that the question of whether damages are available under Pennsylvania antitrust law is an open one, an equitable remedy is possible. See, Collins, 304 A.2d at 498. Also, the availability of a private damage remedy for a civil conspiracy to perform an unlawful act is recognized in Pennsylvania. See, e.g., Thompson Coal Co. v. Pike Coal Co., 412 A.2s 466, 472 (Pa. 1979). The unsettled question of whether XF has stated a claim upon which relief can be granted under Pennsylvania law does not allow a federal court to exercise jurisdiction over that claim. This is a question for a state court to decide. If no such remedy exists, then Count I of the Complaint should be dismissed by the state court. If the Plaintiff's state antitrust claims fail under Pennsylvania law, then the Defendant wins. It is not necessary that a federal court decide this issue.

**IV. Conclusion**

Plaintiff XF chose to bring its suit in the Pennsylvania state court system. Since its antitrust cause of action neither implicates a question of federal law nor involves a subject matter completely preempted by federal law, Defendants' removal based on federal question jurisdiction was improper. Also, the Court finds that the unsettled question of whether Plaintiff can recover under Pennsylvania law does not affect the outcome of this Motion to Remand.

Therefore, the Court will remand the case back to the Court of Common Pleas, County of Philadelphia.

An appropriate Order follows.

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**ORDER**

AND NOW, this 2nd day of November, 1999, upon consideration of Plaintiff's Motion to Remand (Docket No. 6), Defendant's Memorandum in Opposition to Remand (Docket No. 10), and Plaintiff's Reply (Docket No. 12); it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED** and that this case is remanded back to the Court of Common Pleas, County of Philadelphia.

It is **FURTHER ORDERED**, that Plaintiff's Motion for costs and expenses is **DENIED**.

This case shall be marked **CLOSED.**

BY THE COURT:

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RONALD L. BUCKWALTER, J.